

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

ELLEN SMOAK

Plaintiff,

v.

**BIOHEALTH RX, LLC, EDWARD COKE
MANN III, and EDWARD COKE MANN
IV**

Defendants.

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CIVIL ACTION NO. 3:25-cv-919

JURY DEMANDED

**DEFENDANTS' ALTERNATIVE MOTION TO DISMISS
PURSUANT TO RULE 12(B)(6), FED. R. CIV. P.**

On April 28, 2025, Defendants filed a Motion to Dismiss pursuant to Rules 12(b)(1), (2), (3), and/or (5), Fed. R. Civ. P., in which they assert that all claims (except for Count IV's sexual harassment claim) should be dismissed on the basis that the claims are governed by a binding and enforceable arbitration clause in the BioHealth Operating Agreement and that this Court lacks personal jurisdiction over Edward Coke "Bud" Mann, III. For the following reasons, Plaintiff's claim for sexual harassment must be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P. and, in the event that the Court declines to enforce the arbitration provision and finds it does have personal jurisdiction over Bud Mann, then all claims in the Complaint must be dismissed because Plaintiff has failed to state a claim for which relief may be granted as a matter of law. Dismissal of the Petition, in its entirety, is the only appropriate remedy in these circumstances for the reasons more fully set forth below.

SUMMARY OF GROUNDS FOR DISMISSAL

Plaintiff's sexual harassment and retaliation claims (both encompassed in Count IV) are subject to dismissal with prejudice pursuant to Rule 12(b)(6), Fed. R. Civ. P., due to Plaintiff's failure to exhaust administrative proceedings before filing this legal action as statutorily required. Plaintiff does not allege that she timely filed any administrative charge(s) (because she has not) as required by the Texas Commission on Human Rights Act, TEX. LAB. CODE ANN. §§ 21.001, *et seq.* (the "TCHRA").¹ Because Plaintiff is now beyond the statutory deadlines to file such administrative filings, her claims for sexual harassment and retaliation are subject to dismissal with prejudice. To the extent Plaintiff can show that any of her allegations are not yet beyond the administrative filing deadline(s), the claims must still be dismissed without prejudice for administrative review before she can proceed with a legal action. Plaintiff's intentional infliction of emotional distress claim (Count V) fails as a matter of law as it duplicates an existing statutory or common law remedy provided by the TCHRA and/or Title VII.

Moreover, Plaintiff's claims are subject to dismissal pursuant to Rule 12(b)(6), Fed. R. Civ. P. Even if the factual allegations asserted by Plaintiff in Counts I, II, and III of the Petition are accepted as true, the claims are barred by operation of the statute of frauds. TEX. BUS. & COM. CODE ANN. § 26.01(6). Counts VI, VII, and VIII are subject to dismissal because Plaintiff has not sufficiently stated a claim upon which relief can be granted as a matter of law.

Accordingly, in the alternative to Defendants' Motion to Dismiss pursuant to Rules 12(b)(1), (2), (3), and/or (5), Fed. R. Civ. P. (Doc. No. 11), for the reasons more fully set forth in

¹ Or the federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"). However, Title VII is inapplicable as BioHealth did not employ fifteen (15) or more persons for 20 or more calendar weeks in 2023 or 2024. *Id.* at § 2000e(b) (defining "employer"). Indeed, BioHealth was not formed until 2024.

the attached supporting memorandum of law, Defendants respectfully request the Court to dismiss all claims in the Petition.

By: /s/ S. Craig Wilcox
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***ATTORNEY FOR DEFENDANTS BIOHEALTH RX,
LLC, EDWARD COKE MANN III AND COKE MANN
IV***

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document has been served on all counsel of record in accordance with the Federal Rules of Civil Procedure, on this 28th day of April, 2025.

/s/ S. Craig Wilcox
S. CRAIG WILCOX